STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HEALTH

In the Matter of the Proposed Suspension, Revocation, or Non-Renewal of the Nursing Home Licenses of Parkway Manor Healthcare Center and Innsbruck Healthcare Center.

ORDER COMPELLING DISCOVERY

By a written Motion filed July 27, 1989, Parkway Manor Healthcare Center and Innsbruck Healthcare Center ("the Respondents") sought an Order compelling the Minnesota Department of Health to respond to deposition questions and produce documents concerning performance evaluations of and disciplinary measures taken against investigators of the Office of Health Facility Complaints who were involved in the investigations leading to this contested case proceeding. On August 4, 1989, the Department of Health filed a memorandum in opposition to the Motion. The Respondents filed a reply memorandum in support of their motion on August 11, 1989.

Thomas J. Barrett, Esq. and Louis P. Smith, Esq. , of the firm of Popham, Haik, Schnobrich and Kaufman, Ltd., 222 South Ninth Street, 3300 Piper Jaffray Tower, Minneapolis, Minnesota 55402, and Malcolm J. Harkins, Esq., of the firm of Casson, Harkins and LaPallo, Suite 800, 1233 20th Street N.W., Washington, D.C. 20036-2396, represented the Respondents. Penny Troolin, Special Assistant Attorney General, Suite 136, 2829 University Avenue S.E., Minneapolis, Minnesota 55414, represented the Department of Health.

Based upon the memoranda filed by the parties, all of the filings in this case, and for the reasons set out in the memorandum which follows,

IT IS HEREBY ORDERED:

(1) The Department shall provide Respondent's attorneys with any documents concerning disciplinary matters and job performance evaluation for Peter Collinson on or before September 11, 1989. Respondent's attorneys shall not further disseminate the documents.

2 The documents shall be sealed, shall remain nonpublic, and shall be

used only in connection with this contested case proceeding. At the close of this proceeding all copies of the documents shall be returned to the Department. Any discussion of the documents in a deposition or at hearing shall also be sealed and remain nonpublic.

(3) The Department shall, on or before September 11, 1989, provide to the Administrative Law Judge all documents concerning disciplinary action or performance evaluation for any other investigators involved in the investigation of Respondent's facilities leading to this proceeding, for the purposes of an in camera review.

Dated: August 30th 1989.

GEORGE A. BECK
Administrative Law Jucge

MEMORANDUM

The Respondents in this matter have filed a Motion to Compel as a result of the Department's refusal to provide information concerning disciplinary action and performance evaluation of investigators involved in the assessments made against the Respondents' facilities. During the deposition of the Director of the Office of Health Facility Complaints, Arnold Rosenthal, counsel for the Department instructed Mr. Rosenthal not to answer a series of questions related to disciplinary action taken against investigator Peter Collinson. Mr. Collinson participated directly in six of the nine penalty assessments at issue in this proceeding.

The Respondents argue that the Department's standards and practices for issuing penalty assessments are at the heart of this case. They argue that the overall competence and credibility of each investigator including his or her ability to observe, verify and accurately report facts and to interpret and apply regulations is relevant to this case and that the data sought would bear on competence and credibility. They also suggest that since the Department has few written policies concerning surveys and investigations, the employee performance and disciplinary action information may be the only direct evidence of standards for nursing home evaluation.

The Department of Health states that the Minnesota Government Data Practices Act prohibits the disclosure of performance evaluations and nonfinal disciplinary action such as that sought by the Respondents. Under Minn. Stat. sec. 13.43, subd. 4 all personnel data is private data on individuals unless -specifically_ listed elsewhere- in the statute. The data sought by the Respondents is not listed. However, subd. 4 also provides that private personnel data 'may be released pursuant to a court order under Minn. Stat. sec. 13.05, subd. 4, private data- may also be used -by- and disseminated to any person or agency if the individual subject of the data gives his or her informed consent.

The parties agree that whether this data should be disclosed must be analyzed under Minn. Stat. sec. 13.03 _subd. 6 which establishes a two-step process for determining whether and how private or confidential -data if to be

disclosed when a motion to compel discovery is brought. The Administrative Law Judge must first decide whether the data is discoverable pursuant to the Rules of Evidence and- Civil procedure appropriate to the action. If it is discoverable, it must then be decided whether the benefit to the party .

seeking access to the data outweighs any harm to the confidently interests

of the agency_maintaining the data, or of any person who has provided the data, or who is the subject of the_da a, or to the privacy interest of an individual identified in the data. The statute authorizes the Administrative Law Judge to issue any protective orders necessary to insure proper handling of the data by the parties .

The Department argues that the Respondents have not demonstrated the relevance of the data sought. The Department suggests there is no reason to believe that these personnel records will supply evidence relevant to whether or not the Department's policies and procedures have been applied consistently and properly The Department also suggests that personnel data relating back to 1976 is not related to correction orders and penalty assessments issued to the Respondents during 1987 and 1988. It is concluded, however, that the Respondents have demonstrated the relevance of the data sought within the meaning of the rules of evidence and Minn. Rule 1400,6700, subp. 2. Under Minn. Rules of Civil Procedure 26.02(a), even information inadmissible at trial is discoverable if it appears reasonably likely to lead to the discovery of admissible evidence. See also , Jeppson v. Swanson, 243 Minn. 547, 68 N.W.2d 649 (1959). Evidence is relevant if it would logically tend to prove or disprove a material fact in issue. Boland--v. Morrill, 27O Minn. 86, 132 N.W.2d 711, 119 (1965). Should the data show that an investigator was not able to review and interpret data or apply nursing home regulations, then the information would have some relevancy. Although such data about an investigator which was generated 10 years ago will have presumably less relevance, it could potentially still have some bearing on an investigation occurring in 1987.

In addition to demonstrating relevancy, the Respondents must also show that their need for the information sought outweighs the privacy interests of the Department and its employees. Although the Respondents appear to suggest that the discovery rules take precedence over the Data Practices Act, Minn. Stat. sec. 13.03, subd. 6 constitutes an express legislative direction concerning

the conduct of discovery in administrative cases and its requirements must be implemented in this contested case proceeding.

The Department argues that it has a strong interest in keeping its employees' files private to protect its relationship with employees and relationships among employees. It argues that disclosure of private personnel data could have a chilling effect on the willingness of supervisors to be candid in their evaluation of employees. It suggests that Department investigators have a legitimate expectation that their personnel data will remain private. The Department also suggests that such discovery could cause annoyance, embarrassment and oppression to the investigators within the Minn, Rule Civ. Proc. 26.03. The Respondents point to the significance of this case, i.e., the potential loss of licenses for 43 of its nursing facilities in the State of Minnesota, as justifying extensive discovery. They also suggest that the Department can easily avoid problems by simply not publicizing the fact of disclosure to its employees. The Respondents argue that they cannot obtain this information from another source.

one of the investigators, Linda Sue Jackson, filed an affidavit objecting to the release of performance evaluations or any other private documents in her personnel file. Another investigator, Catherine Swanson, sent a letter indicating that she believed her personnel file was a private communication between her and her employer and should not be used by the Respondents to

present their case, However, former investigator Peter Collinson filed a letter stating that he supported Respondents' motion concerning the production of documents concerning disciplinary matters and job performance evaluations involving myself.' He did request that the data not be made public , however.

Since private data may be disseminated if the subject gives his informed consent, the data requested in regard to Peter Collinson must be produced. The data will be produced however only to the attorneys for Respondents and shall remain nonpublic and shall be sealed. The data shall be used only in connection with this contested case proceeding and all copies shall be returned to the Department at the close of this contested case proceeding . Additionally , any discussion of the contents of the data in deposition transcripts shall be sealed. A different situation exists in regard to the personnel data of those employees who do not consent to its production. Important interests exists on both sides of this question. Should an investigator have been disciplined for action taken concerning a correction order or assessment at issue in this proceeding, then the information would be of significance to the Respondents' case. However, public employees have legitimate expectations of privacy in regard to nonpublic personnel data. Additionally, it is difficult to see how a supervisor can candidly evaluate employees if that evaluation might be disclosed to the Department's detriment in a subsequent contested case proceeding. Clearly, the routine production of state employee personnel data in license cases would cause serious consequences.

The Administrative Law Judge is persuaded that given the important privacy interests which exist, a decision as to balancing the benefit to the Respondents_ against the harm to the confidenliality interests of the employees can only be made after in camera inspection pursuant to Erickson v. MacArthur, 414 N.W.2d 106 (Minn. 1987). In examining the application of Minn. Stat. S 13.03, subd. 416 the context of discovery of police deportment internal affairs files, the Supreme Court in Erickson directed the trial court to conduct an in camera review noting that without inspection of the documents themselves the discovery order was based upon mere speculation. 414 N.W.2d at 409. Accordingly, the Department is directed to file the data for employees

other than Mr. Collinson with the Administrative Law Judge on or before September 11 , 1989 for review and a determination as to whether or not the data should be provided to Respondents' attorneys under Minn. Stat. 13.03, subd. 6.

G. A. B.